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No. 03-967

Supreme Court, U.S.
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In The Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

v.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY, and the DEPARTMENT OF AGRONOMY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE FIFTH CIRCUIT'S ULTIMATE EMPLOYMENT ACTION DOCTRINE IS DIFFERENT FROM AND FAR MORE RESTRICTIVE THAN THE GENERAL RULE THAT ANY ALLEGED DISCRIMINATORY ACTION MUST BE *ADVERSE*

The Brief in Opposition confuses two quite distinct Title VII issues. All circuits hold that the discrimination forbidden by section 703 of Title VII, and by the anti-retaliation provision of section 704, is limited to *adverse* employment actions. Trivial slights that cause no real harm are not actionable. Direct economic harms, on the other hand, are always actionable. Paying a worker $100 a year less is an *adverse* action, regardless of whether the motive was race, gender, national origin or religion, or retaliation for protected activity. Paying Kang a lower raise was undeniably an adverse action in that sense, regardless of what unlawful motive may have been involved.

The Fifth Circuit alone[1] construes section 704 to contain an additional requirement not found in the general anti-discrimination provisions of section 703. Relying on differences in the terminology of section 703 and 704, the Fifth Circuit insists that a retaliatory act not only must be adverse (in the sense that it causes some non-trivial harm) but also must involve a particular *kind* of employment practice, viz. an ultimate employment decision.[2] Whether a retaliatory practice constitutes an ultimate employment action has nothing to do with the

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[1] The Eighth Circuit has at times adhered to the ultimate employment action doctrine, albeit arguably in a somewhat form.

[2] This textual analysis is set out in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (1997). This analysis has been widely criticized. *See, e.g.*, Note, *Adverse Employment Actions: The Wisdom of EEOC Guidance*, 54 RUTGERS L. REV. 739, 760-61 (2002); Comment, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON. L. REV. 217, 233-34 (2001).

magnitude of the harm (the traditional test for an adverse employment action); it turns solely on the *methodology* by which the harm was inflicted. Thus in the Fifth Circuit an action which indeed caused very serious harm, which would be actionable if taken on the basis of race, gender, or national origin (in violation of section 703), and which was taken for a retaliatory purpose, will nonetheless be lawful under section 704 if the particular type of retaliation utilized was not an ultimate employment action.

This case illustrates the difference between the widely accepted *adverse* employment action rule and the Fifth Circuit's distinctive *ultimate* employment action doctrine. Kang asserted he was improperly given a smaller pay raise; setting his raise at, for example, 3% rather than 4%, would over the years cost Kang thousands of dollars. That assuredly meets the general requirement of an *adverse* action; it would be actionable even in the Fifth Circuit if Kang had been given a lower raise because of his race. But under the ultimate employment decision doctrine, causing that same substantial harm for a retaliatory purpose is lawful in the Fifth Circuit because of the particular manner (a lower raise, rather than a reduction in Kang's existing salary) by which it was inflicted. The Fifth Circuit has in other cases applied the ultimate employment action doctrine to hold lawful retaliatory acts that undeniably were adverse and caused substantial injury. *E.g., Hernandez v. Crawford Building Materials Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S.Ct. 82 (2003) (overturning $20,000 damage award against employer that had filed a bad faith retaliatory counterclaim); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir.), *cert. denied*, 118 S.Ct. 336 (1997) (overturning $50,000 damage award for retaliatory harassment).

There is nothing fact-specific about the application of the ultimate employment action doctrine in this case. Respondent does not deny that under the decision below it is entirely lawful in the Fifth Circuit to award a lower raise in retaliation for activity protected by section 704. Respondent emphasizes that in the Fifth Circuit it would be illegal to retaliate by denying a raise *completely*, or

perhaps by providing only a trivial raise (*e.g.*, $1 a year) that was the equivalent of no raise at all. (Br. Opp. 7). But that limitation poses no serious obstacle for an employer which wishes to inflict a significant economic sanction on an employee who complained to the EEOC; the Fifth Circuit merely requires that the employer not be utterly blatant.

II. THE DIFFERING LEGAL STANDARDS UTILIZED BY THE COURTS OF APPEAL MEAN THAT MANY RETALIATORY PRACTICES ILLEGAL IN OTHER CIRCUITS ARE LAWFUL IN THE FIFTH CIRCUIT

Respondent suggests that, despite the sharp intercircuit conflict set out in the Petition and noted below, the circuits in practice reach similar results regarding what forms of retaliation are unlawful under Title VII. That assertion is palpably incorrect.

The circuits rejecting the ultimate employment doctrine have readily identified a wide range of specific retaliatory acts that are permitted only in the Fifth Circuit. For example, in rejecting the Fifth Circuit ultimate employment action standard, the Ninth Circuit explained:

> [W]e cannot square such a rule with our prior decisions. Actions that we consider adverse employment actions, such as the lateral transfers in *Yartzoff* [*v. Thomas*, 809 F.2d 1371 (9th Cir. 1987)] and *St John* [*v. Employment Development Dept.*, 642 F.2d 273, 274 (9th Cir. 1981)], the unfavorable reference that had no effect on a prospective employer's hiring decisions in *Hashimoto* [*v. Dalton*, 118 F.3d 671 (9th Cir. 1997)], and the imposition of a more burdensome work schedule in *Strother* [*v. Southern California Permanente*

> *Medical Group*, 79 F.3d 1371 (9th Cir. 1987)] are not ultimate employment actions.

Ray v. Henderson, 217 F.3d 1234, 1242 (9th Cir. 2000).[3]

In *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998), the Eleventh Circuit expressly joined the First, Ninth and Tenth Circuits in holding "that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." 141 F.3d at 1456. The Eleventh Circuit then proceeded to list decisions from those other circuits which had held unlawful specific retaliatory actions that "fall short of ultimate employment actions."

> *See Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provisions and listing as examples, "employer actions such as . . . disadvantageous transfers or assignments, . . . unwarranted negative job evaluations and toleration of harassment by other employees."); . . . *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (. . . malicious prosecution action brought by a former employer.)

141 F.3d at 1456.

In *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001), the Fourth Circuit held that the retaliatory acts alleged by the plaintiff in that case could be actionable,

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[3] The Ninth Circuit also noted that the standard in the Second and Third Circuits also permitted practices that had been held unlawful in past Ninth Circuit cases. 217 F.3d at 1242.

although they clearly would not have been in the Fifth Circuit.

> [T]he Fifth Circuit expressly held *insufficient* the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized *could constitute adverse employment action*. . . . If this circuit employed a similar "ultimate employment decision" standard in retaliation cases, then indisputably von Gunten would be unable to mount a prima facie case. This is so because none of [the defendant's] retaliatory acts constituted an ultimate employment decision – none involved hiring, firing, refusal to promote, or the like.

243 F.3d at 865 (Emphasis added). The Fourth Circuit spelled out the retaliatory acts against the plaintiff that would have been permitted under the Fifth Circuit's ultimate employment decision doctrine:

> These include withdrawal of the state car that had been issued to von Gunten since her employment began, forcing her to use her personal car for work travel and request reimbursement for her mileage expenses; downgrading her year-end evaluation; reassigning her to shoreline survey work; improperly handling various administrative matters; and subjecting her to retaliatory harassment creating a hostile work environment.

243 F.3d at 862-63.

In the instant case the Fifth Circuit held that giving a worker a lower raise in retaliation for protected activity was not an ultimate employment action. Other circuits which reject that narrow Fifth Circuit standard have concluded that setting a raise at a lower level is indeed an adverse action. *E.g.*, *Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014, 1030 (7th Cir. 2003) ("Dr. Hildebrandt has shown each of the required elements of a prima facie case: . . . she suffered an adverse employment action, namely a paycheck reflecting her 1997 salary which was determined with a lower raise than that given her coworkers"); *Saleh v. Upadhyay*, 2001 WL 585085 *11

(4th Cir.) ("The reduction of Saleh's raises for three years in a row constitutes an adverse employment action. . . . ").

Respondent's defense of the ultimate employment decision doctrine baldly reveals the grave problem posed by that standard. The Fifth Circuit rule, respondent explains, permits an employer to know "exactly how to 'safely' retaliate." (Br. Opp. 13). This result, respondent argues, is good for employees, because in the Fifth Circuit they know in advance what forms of retaliation may be used against them if they complain to the EEOC or engage in other protected activity. "[E]mployees . . . benefit by knowing, in advance, what costs they can be expected to have to bear if they file a claim of discrimination or otherwise engage in protected activity. . . . [I]t destroys any misconception that a person might otherwise have about what can happen to him if he files a charge of discrimination." (Br. Opp. 13). That is assuredly inconsistent with the very purpose of section 704, which was to *prohibit* retaliation, not merely to regulate and publicize the forms of permissible reprisals. Section 704 was enacted to maintain "unfettered access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 348 (1997), not simply to require advance notice of the types of sanctions that can be imposed for using those mechanisms.

III. THE INTER-CIRCUIT CONFLICT PRESENTED BY THIS CASE IS WIDELY RECOGNIZED

This case presents one of the most widely recognized inter-circuit disputes in federal employment law. Every commentator to consider the issue has emphasized the existence and importance of that conflict.

> Within the United States Circuit Courts of Appeal, current disagreement exists concerning the meaning of "adverse employment action" [in retaliation cases]. There are two basic interpretations: one interpretation considers mostly any adverse action by an employer motivated by the desire to retaliate actionable and the other

> interpretation enforces a much stricter standard that requires the adverse employment action be an "ultimate employment action." . . . The result of this strict interpretation of the adverse employment action, which is expressly rejected by the EEOC, is that much employer conduct that is actionable in other . . . circuits is not actionable in the Fifth and Eighth Circuits.

Note, *Adverse Employment Actions: The Wisdom of EEOC Guidance*, 54 RUTGERS L. REV. 739, 45-48 (2002) (Footnotes omitted); *see id.* at 746-47 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

> The disagreement between the circuits has created a landscape of case-law that is heavily dependent on which circuit a plaintiff is auspicious enough to be able to bring suit in. As a consequence of the unpredictability and inherent unfairness of such a situation . . . the Supreme Court should address the issue and ultimately require deference to the more soundly reasoned EEOC guidelines.

Id. at 741.

> [There is a] controversy among the circuits surrounding the scope of . . . "adverse employment action". . . . Prohibited employer behavior characterized as adverse employment action varies markedly. Its definition ranges from a liberal construction of adverse employment action, including such things as mere changes in the workplace, to a restrictive interpretation characterizing only ultimate employment decisions as adverse.

Note, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 KY. L. J. 273, 275-76 (2002) (Footnotes omitted); *see id.* at 280-81 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

> The conflict among the circuits over the adverse employment action element of a retaliation claim is one ripe for Supreme Court resolution. The application of disparate standards to individual cases "has left employers to guess what employment actions might be considered unlawful retaliation."

Id. at 276, 292 (Footnote omitted).

> When it took the broad view of adverse employment actions in [*Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)], the Ninth Circuit joined the First, Seventh, Tenth, Eleventh, and D.C. Circuits in the current three-way split on this issue. . . . The Fifth and Eighth Circuits take the most restrictive view and require the retaliatory action to be an "ultimate employment decision" before it rises to the level of an adverse employment action.

Note, *The Meaning of Adverse Employment Actions in The Context of Title VII Retaliation Claims*, 9 WASH. U. J. L. & POL'Y 379, 380-81 (2002) (Footnotes omitted).

> The circuits . . . are split on what activities may qualify as an adverse employment action [in a retaliation case.] . . . The First, Second, Seventh, Ninth, Tenth, and D.C. Circuits have all joined the Eleventh Circuit in holding that employers can be liable for retaliation under Title VII even when their actions do not reach the level of an ultimate employment decision. . . . Unlike the narrow-interpretation circuits, the broad-interpretation circuits have readily recognized that an adverse employment action can be more than basic hiring, firing, or failing to promote.

Note, *An Adverse Employment Action – Not Just An Unfriendly Place to Work: Co-Worker Retaliatory Harassment under Title VII*, 87 IOWA L. REV. 235, 236-42 (2001) (Footnotes omitted); *see id.* at 244-54 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

> [F]ederal appellate . . . courts are sharply divided as to what constitutes an adverse employment action [in a retaliation case]. A minority of courts argue that only "ultimate employment decisions," such as hiring, firing or demoting, are considered "adverse employment actions." A majority of courts, however, contend that the employer's alleged retaliatory action need not reach the level of an "ultimate employment decision," . . . This split concerning what constitutes an adverse employment action under the retaliation provisions of Title VII is causing an uneven application of the law in the federal circuits.

Comment, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON L. REV. 217, 219-30 (2001) (Footnotes omitted).

> [T]he ultimate employment decision standard contradicts Supreme Court precedent. . . . Adoption of the ultimate employment decision standard has the potential to encourage employers to retaliate against individuals exercising their Title VII rights, so long as no retaliatory act amounts to an "ultimate employment decision."

Id. at 233-34 (Footnotes omitted).

> Currently the federal circuits are split in what they hold to be an adverse employment action constituting retaliatory discrimination. . . . Among the federal circuit courts, three basic positions have emerged. Some circuits . . . hold that only "ultimate employment actions" such as hiring, discharging, demoting, or changing compensation constitute adverse employment actions. Other circuits take the position that, to be adverse under the statute, an action must "materially affect" the compensation, terms, conditions, or privileges of employment. The third group uses a very broad interpretation of adverse action, reflective of the EEOC guidelines, finding the standard met if the action is "reasonably

> likely to deter employees from engaging in protected activity,". . . .

Casenote, *Staying on the Straighter and Narrower: A Criticism of the Court's Definition of Adverse Employment Action Under the Retaliation Provision of Title VII*, 43 S. TEX. L. REV. 1323, 1333-34 (2002) (Footnotes omitted); *see id.* at 1335 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

CONCLUSION

In briefs filed in the lower courts, the EEOC has repeatedly expressed the view that the ultimate employment action doctrine leads to materially different results than the majority interpretation of section 704, and that the highly restrictive Fifth Circuit view poses a serious threat to the Title VII administrative process. If the Court is uncertain as to the importance of the inter-circuit conflict raised by this case, it might be appropriate to invite the Solicitor General to file a brief expressing the views of the United States.

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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